No. 09-549

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

BYRON SMITH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The court of appeals created a new cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for Eighth Amendment deliberate indifference claims by an inmate who is injured during a prison work assignment. It did so notwithstanding the existence of the Inmate Accident Compensation Act (IACA), 18 U.S.C. 4126(c), an administrative remedy that this Court has found provides the "exclusive" remedy for a federal prisoner suffering a work-related injury, see *United States* v. *Demko*, 385 U.S. 149, 152, 154 (1966). Respondent denies both that the court of appeals' decision conflicts with any decision of this Court and that this Court's forthcoming decision in *Hui* v. *Castaneda*, cert. granted, No. 08-1529 (Sept. 30, 2009) (*Castaneda*), may be relevant to the disposition of the issue presented in this case. Because respondent is incorrect on both counts, this Court should hold the

government's petition for a writ of certiorari pending the Court's decision in *Castaneda*, and then dispose of the petition accordingly.

As this Court recently reiterated in *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007), a court's consideration of "whether to recognize a *Bivens* remedy may require two steps": (1) a determination of "whether any alternative, existing process for protecting the interest [at stake] amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages"; and (2) consideration of whether "any special factors counsel[] hesitation before authorizing a new kind of federal litigation." *Ibid.* (quoting *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983)). The common issue shared by this case and *Castaneda* involves the proper execution of the first step. In both cases, the courts of appeals improperly created a new *Bivens* remedy in spite of Congress's prior creation of a remedial scheme intended to occupy the relevant field.

The first step of the *Wilkie* analysis examines the nature of existing, non-*Bivens* remedies for the injury alleged. In this case, respondent had the right to seek compensation for his claimed injury through the remedial scheme implementing the IACA. That scheme authorizes an inmate injured in the course of a prison work assignment to receive compensation both for wages lost as a result of his injury, 28 C.F.R. 301.101(b), 301 Subpt. B, and for any residual physical impairment that remains when he is released from custody, 28 C.F.R. 301.303(a), 301.314(a). In purpose and design, the IACA operates as a typical workers' compensation system, and this Court has noted that the payments authorized under the IACA for residual injuries "compare[] favorably with compensation laws all over the country," and, in-

deed, "offer[] far more liberal payments than many of the state compensation laws." *Demko*, 385 U.S. at 152-153. Like typical workers' compensation systems, the IACA is intended to be the exclusive remedy for the work-related injuries it covers. As this Court reasoned in *Demko*, "where there is a compensation statute that reasonably and fairly covers a particular group of workers, it presumably is the exclusive remedy to protect that group." *Id.* at 152. That principle led this Court to conclude that the IACA is in fact the exclusive remedy against the United States for inmates injured on the job. *Id.* at 152-154.

The remedial scheme at issue in *Castaneda* similarly evinces a congressional purpose of exclusivity—in that case, an intent that the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, be the sole remedy for persons injured as a result of medical functions performed by a commissioned officer or employee of the Public Health Service. In 42 U.S.C. 233(a), Congress stated that an action under the FTCA against the United States for such injuries shall be "exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim."

As explained in the petition for a writ of certiorari (Pet. 13-15), both the court of appeals in this case and the Ninth Circuit in *Castaneda* created a new *Bivens* cause of action in reliance on this Court's statement in *Carlson* v. *Green*, 446 U.S. 14, 18-19 (1980), that courts should refrain from creating a *Bivens* claim when "Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." See Pet. App. 18a-19a; *Castaneda* v. *United States*, 546

F.3d 682, 689 (9th Cir. 2008), petitions for cert. granted, No. 08-1529 and No. 08-1547 (Sept. 30, 2009), petition for cert. dismissed, No. 08-1547 (Oct. 29, 2009).

But in the nearly three decades since this Court decided *Carlson*, this Court has repeatedly clarified that in undertaking the first step of the *Wilkie* analysis, courts should not demand any equivalence between a *Bivens* claim and an alternative statutory remedy (Pet. 14-15). According to the Court's more recent cases, Congress need not explicitly declare that a remedial scheme is intended to supplant a *Bivens* claim. Nor need such a scheme be as effective as a *Bivens* claim in order to preclude the creation of a direct cause of action under the Constitution. *Bush*, 462 U.S. at 380-390; *Schweiker* v. *Chilicky*, 487 U.S. 412, 424-429 (1988); *Wilkie*, 551 U.S. at 551-562.

Respondent downplays the court of appeals' reliance on the statement in *Carlson*, defending its holding primarily by arguing that the purposes of *Bivens* are not served by the IACA (Br. in Opp. 4-5, 9). That is just another way of arguing that the IACA is not as effective as a *Bivens* remedy in curing or compensating for an alleged constitutional injury. *Wilkie* made clear that its analysis is not designed to determine whether an existing remedial scheme accomplishes the same goals as *Bivens*. The first step of that analysis assesses only whether the structure and scope of the existing scheme "amounts to a convincing reason for the Judicial Branch to refrain from" superimposing on it a "new and freestanding remedy in damages." *Wilkie*, 551 U.S. at 550. In *Wilkie*, the Court surveyed the alternative remedies available to the plaintiff, noting that "the forums of defense and redress open to [the plaintiff] are a patchwork, an assemblage of state and federal, administrative

and judicial benches applying regulations, statutes, and common law rules." *Id.* at 554. In assessing these various alternative remedies, the Court asked not whether they served the same purposes as a *Bivens* remedy, but instead, whether they demonstrated "that Congress expected the Judiciary to stay its *Bivens* hand." *Ibid.* In *Wilkie*, the Court concluded that the patchwork of remedies available did not show that Congress intended to preclude a *Bivens* remedy. In this case, by contrast, the nature of the workers compensation scheme embodied in the IACA provides ample reason to conclude that Congress intended the IACA to be "the exclusive remedy" available for inmates who are injured during a prison work assignment. *Demko*, 385 U.S. at 152.

Respondent argues (Br. in Opp. 9) that this Court's holding in *Demko* that the IACA precludes "recovery by common-law torts" through the FTCA for injuries resulting from prison work assignments, 385 U.S. at 153, is not relevant to the question presented in this case—*i.e.*, whether the IACA precludes recovery directly under the Constitution for such injuries. Respondent reasons (Br. in Opp. 9) that the holding in *Demko* is immaterial "because FTCA and *Bivens* claims serve different purposes." But this Court's exclusivity holding in *Demko* was based on the structure and purposes of the IACA, not on the structure and purposes of the FTCA. See 385 U.S. at 151-153. The exact same focus is required in the first *Wilkie* step. Accordingly, the Court should reach the same conclusion about Congress's intent for the remedial scheme implementing the IACA to

serve as the exclusive remedy for inmates injured during work assignments.

Respondent is also incorrect that this Court's forthcoming decision in *Castaneda* is likely to be "irrelevant" (Br. in Opp. 14) to the issue presented in this case. The court of appeals in *Castaneda* applied the same erroneous analysis used by the court of appeals in this case. That court too asked whether the FTCA provides a remedy that is "equally effective" as a *Bivens* remedy rather than asking whether Congress intended the existing remedial scheme to be exclusive. *Castaneda*, 546 F.3d at 689-691. This Court's review of that analysis will surely shed light on the appropriate disposition of this case.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be held pending the Court's decision in *Hui* v. *Castaneda*, No. 08-1529, and then disposed of accordingly.

Respectfully submitted.

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* Moreover, respondent's suggestion (Br. in Opp. 7) that this Court should infer congressional approval of the two previous courts of appeals decisions holding that the IACA does not preclude the creation of a *Bivens* remedy is meritless. In support of his suggestion, respondent cites cases inferring congressional approval of *this Court*'s previous interpretations of statutes from many years of congressional inaction. No such approval may be inferred from Congress's failure to respond to erroneous decisions from two courts of appeals, particularly when those decisions conflict with decisions of this Court.